NO. 16148

United States
COURT OF APPEALS
for the Ninth Circuit

HAMISH SCOTT MacKAY,

Appellant,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

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TO THE HONORABLE WALTER L. POPE, RICHARD H. CHAMBERS, AND FREDERICK G. HAMLEY, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

COMES NOW Hamish Scott McKay and respectfully petitions the above Court for a rehearing *en banc* of his appeal in which an opinion affirming the judgment of the District Court was filed June 9, 1959 for the following reasons and upon the following grounds:

1. The Court erred in finding that Appellant is an alien.

2. The Court erred in finding that the instant case does not fall within the rule of *Rowoldt v. Perfetto,* 355 U.S. 115.

3. The Court erred in finding that Appellant was afforded a fair hearing on his application for suspension of deportation.

4. The Court erred in finding that the denial of suspension of deportation was not arbitrary, capricious, and an abuse of discretion.

5. The Court erred in finding that the statute under which the government seeks to deport Appellant is constitutional.

ARGUMENT

Petitioner Is Not An Alien By Virtue Of His Father's American Citizenship

The Court has denied Appellant's claim that he is an American citizen although it admits that from the facts, Appellant's father could not have resided in Canada for the three years required for a valid Canadian naturalization. The Court refuses to permit Appellant to challenge the certificate of naturalization because this would amout to a collateral attack and "It would appear that considerations of comity and reciprocity would thus preclude American courts from entertaining a collateral attack upon a decree of naturalization entered by a foreign court." (P. 4)

The Court's view of the case would preclude Appellant from ever establishing his American citizenship because the same "collateral attack" rule would undoubtedly be applied by Canadian courts should Appellant attempt to upset there the naturalization certificate of his father. Certainly the Canadian government, the only direct party to his father's naturalization now in existence, would have no interest in going into a Canadian court to revoke the naturalization of a deceased person.

Thus we are faced with the conclusion that even where such an important matter as deportation is involved, an alleged alien cannot prove his citizenship because the Court applies the formal doctrine against collateral attack.

We could understand this rigid viewpoint if the facts were in dispute. However, the record is crystal clear that Appellant's father could not have been a validly-naturalized Canadian citizen. We urge the Court to look through the formalities of a doctrine to its purpose to the ultimate end that justice be served. The purpose of the collateral attack doctrine is the necessary limitation upon undue continuation of litigation and it is not unlike the purpose of the doctrine of res judicata. The integrity of judgments of courts is involved. The assumption is that justice is best served where facts, once settled by judicial decree, are not permitted to be challenged again, especially when the parties involved are not identical with those in the earlier litigation.

But the Court's application of this judicial rule should not be so mechanical that it overlooks the results which are contrary to the purposes of the doctrine itself. We suggest that this is the situation here, where there is no dispute as to the facts in the naturalization of Appellant's father and no injury can be done to him by an American court's ruling that the naturalization was void. The real issue in this case is whether an unbearable hardship of deportation will be imposed upon Appellant, or whether the facts which are plain and known to everyone will be recognized and Appellant's standing as an American citizen reaffirmed.

Judgments of naturalization have not always been wholly immune to collateral attack where the record is perfectly clear that the judgment is void. The case of *In re Yamashita,* 30 Wash. 234, 70 P. 482, held that a judgment of the state court granting citizenship to Yamashita would not be recognized by the Supreme Court of the State of Washington where the transcript in the citizenship hearing showed conclusively that Yamashita was a Japanese and therefore not eligible for citizenship under the naturalization law at that time. Yamashita had applied for admission to the bar of the Washington Supreme Court as an attorney and because the Court did not consider him a citizen of the United States, his admission to the bar was denied.

We appreciate the Court's consideration of the importance of comity and reciprocity between American and Canadian courts. Yet comity and reciprocity are

policies designed to further justice. Where it is apparent that injustice is being done, and that a Court was deceived, either intentionally or accidentally, and the jurisdictional requirements of Canadian naturalization have been ignored, then we believe that this Court through reasons of humanity, justice, and fairness should declare that the Canadian citizenship of Appellant's father was void and that Hamish Scott McKay is in fact an American citizen by birth.

The Court stresses the technical distinction between intrinsic and extrinsic fraud, conceding that if fraud were shown it would be intrinsic to the decree.

In so doing, the Court misses the point that the three years residence requirement required by Canadian law was jurisdictional insofar as Canadian naturalization is concerned. The kind or degree of fraud or mistake involved in rendering the decree would, in seems to us, be immaterial where the issue is the actual jurisdiction of the court, as distinguished from a situation where the judgment was rendered fraudulently and the court had such actual jurisdiction.

The Act Under Which The Government Seeks To Deport The Appellant Is Unconstitutional As A Bill of Attainder

In its opinion, the Court refuses to seriously consider the claim that the act under which the government seeks to deport Appellant is a bill of attainder on the ground that *Niukkanen v. Boyd,* 241 F2d 938; *Niukkanen v.*

McAlexander, decided April 6, 1959, and *Ocon v. Del Guercio,* 237 F2d 177, all sustained the constitutionality of the act.

A careful examination of the records and the opinions in the cases cited by the Court discloses that at no point was the question of the act as a bill of attainder ever considered by this Court. Moreover, the cases cited in *Ocon v. Del Guercio,* supra, in no way touch upon the bill of attainder point. It is true that the Courts have sustained the constitutionality of the act with respect to other constitutional issues. We believe, however, that on its merits, the question of bill of attainder is a grave and serious one which this Circuit and the Supreme Court has never determined. In the first *Niukkanen* case, this Court issued a per curiam opinion in which it did not discuss the constitutionality of the act. As a matter of fact, counsel in this case represented Niukkanen and were informed on oral argument that the Court would not hear the arguments as to the constitutionality of the act.

Appellant has raised a substantial issue as to the constitutionality of the act, challenging it as a bill of attainder. To date, the Court has not answered the question with a full discussion on the merits. Surely under these circumstances he is not foreclosed from raising the question on this appeal and the Court should consider it *in extenso* before ordering him deported.

There Is Insufficient Evidence To Deport Appellant Under Rowoldt v. Perfetto, 355 U.S. 115

The Court has held, in substance, that it will not reconsider the credibility of witnesses in the light of Appellant's contention that the doctrine of *Rowoldt v. Perfetto,* supra, does not sanction his deportation.

The Court then proceeds to itemize his alleged activities in connection with the Communist Party and in effect gives full weight to all adverse testimony and no weight to his denials and to his other affirmative testimony.

Rowoldt v. Perfetto, supra, requires a "meaningful association" to be proved by substantial evidence in accordance with the statute. Furthermore this evidence must be probative and believable. Yet the Court attempts to apply the *Rowoldt* doctrine but refuses to look at the evidence critically.

Under such ruling, we believe that *Rowoldt v. Perfetto,* supra, is reduced to a cipher.

Appellant Was Not Afforded A Fair Hearing On His Application For Suspension Of Deportation Because The Special Inquiry Officer Was Biased And Prejudiced

The Court holds that a hearing officer who, on a record shot full with conflict and contradictory testimony, even among the government witnesses, describes Appellant as "evasive" and in effect as a liar, is not biased against said person in a reopened hearing on suspension of deportation.

It will be recalled that MacKay denied that he was a member of the Communist Party at the original hearing on the question of deportation. The hearing officer chose to believe the testimony of government witnesses who said that he was such a member.

On the hearing for suspension of deportation MacKay, under the Court's present ruling, was faced with one of two alternatives. Either he could persist in his denial of Communist affiliation and membership with the result that occurred in this case, namely that he was denied suspension of deportation. Or he could on the second hearing reverse himself and admit to Communist membership or affiliation and in such a case he would then be subject to prosecution for perjury and suspension of deportation would certainly be denied on the grounds that he had perjured himself in the prior proceedings.

Thus the Court's ruling has the effect of placing an alien in the position of Appellant here, between two impossible alternatives. In either case, the Appellant would not receive administrative grace. Only those persons, whether guilty of the allegation or not, who come forth from the outset and admit that they were members or affiliates of the Communist Party would be entitled to suspension.

Surely this is not the purpose of the law which empowers the Attorney General to suspend deportation. Such a position is not in accordance with fair play. This is not due process of law.

The Order Denying Appellant Suspension Of Deportation Was Arbitrary, Capricious, And An Abuse Of Discretion And Otherwise Not In Accordance With Law

The Court upholds the legality of the test applied by the hearing officer on suspension of deportation that the Appellant would have to show that he opposed the principles of the Communist Party before he is eligible for suspension of deportation.

The Court, however, fails to note the facts mentioned in Appellant's brief on pages 20 through 22 that the basis on which Appellant was denied suspension was his failure to answer certain questions about the American Committee for the Protection of the Foreign Born.

As we have pointed out, there is no evidence in the record as to the nature of this group, whether it is Communist or otherwise, and whether it is in any way wrong for any alien to have any connection with this group. Furthermore, the questions put to MacKay were never pressed by the government. It could be construed in reading the record that the government in fact abandoned its efforts to draw information concerning this committee from MacKay.

Surely there are limits to the scope of inquiry which the government may make concerning the activities of an alien, even on application for suspension of deportation. As in the case of congressional investigating committees, a hearing on suspension of deportation must be conducted within rules of relevancy and competency just like any other quasi-judicial proceeding.

CONCLUSION

Appellant respectfully suggests that a rehearing be granted, and because of the constitutional issue raised herein, that the rehearing should be *en banc*.

Respectfully submitted,

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Counsel for Appellant.